International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 221, AFL–CIO *and* Kidder, Inc. Case 1–CB–9338

April 27, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND WALSH

On September 30, 1999, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Employer filed an answering brief to the Respondent's exceptions. The Employer filed cross-exceptions, and the Respondent filed an answering brief to the Employer's cross-exceptions. The General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

For the reasons stated by the judge, we find (1) that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by demanding that the Employer interpret the parties' contractual superseniority clause in a manner which would accord the Respondent Union officials superseniority for terms and conditions of employment, such superseniority not being limited to layoff and recall and not otherwise required to further the effective administration of the collective-bargaining agreement, and (2) that the Respondent further violated the Act by demanding arbitration of the matter. We also deny the Employer's cross-exceptions to the judge's failure to order the Respondent to reimburse it for costs and fees the Employer incurred as a result of the Respondent's arbitration demand. We do not find a reimbursement remedy necessary to effectuate the policies of the Act in this case.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 221, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order.

Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT attempt to cause Kidder, Inc. to accord superseniority for terms and conditions of employment that are not limited to layoff and recall and are not otherwise required to further the effective administration of the collective-bargaining agreement.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of the Board's Order, notify the American Arbitration Association that we are withdrawing our request for arbitration of the grievance filed with Kidder, Inc. on April 21, 1998.

INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, LOCAL 221, AFL–CIO

[1] We have modified the notice to comport with the recommended Order.

[2] Sec.10(c) authorizes the Board, upon finding an unfair labor practice, to order the respondent to "take such affirmative action . . . as will effectuate the policies of this Act." It is well established that the Board has broad discretionary authority under this section to fashion remedies that effectuate the policies of the Act and that the Board's exercise of its discretion is subject to limited judicial review. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

The Employer cites *Service Employees Local 32B-32J (Nevins Realty),* 313 NLRB 392 (1993), enfd. in relevant part 68 F.3d 490 (D.C. Cir. 1995). The Board in that case adopted, without comment, the judge's remedy ordering the respondent union to reimburse employer Nevins for reasonable expenses and fees incurred in defending against an arbitration demand. Although the Board did not speak directly to the remedial issue, the violation there was different from the one here. Unlike here, the Board in *Nevins Realty* had found that the grievance was filed not to resolve a dispute involving Nevins' employees but rather to satisfy the respondent's interests elsewhere. The Board also found that the respondent's grievance was not reasonably based on the language of the contract and that its work-preservation defense to the 8(b)(4)(B) allegation was similarly without a colorable basis. It is well within the Board's discretion to have granted the remedy on the particular facts of *Nevins Realty* and to deny it on the particular facts here.

Member Hurtgen notes that although it is within the Board's discretion to grant the requested costs and fees in appropriate circumstances, he finds no such circumstances present in this case. In this regard, he notes that the Respondent did not pursue arbitration after complaint had issued, and specifically requested that arbitration proceedings be held in abeyance. Member Hurtgen also questions whether the Board should enmesh itself in disputes over the payment of purely contractual administrative expenses such as the administrative arbitration filing fee involved here. The record contains no other evidence of expenses incurred in connection with the arbitration.

Kathleen F. McCarthy, Esq., for the General Counsel.
Jay M. Presser, Esq., of Springfield, Massachusetts, for the Respondent.
James O. Hall, Esq., of Somerville, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Springfield, Massachusetts, on August 3, 1999. Subsequently, briefs were filed by all parties. The proceeding is based on a charge filed October 16, 1998,[1] by Kidder, Inc., of Agawan, Massachusetts. The Regional Director's complaint dated February 19, 1999, alleges that Respondent International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 221, AFL–CIO has violated Section 8(b)(1)(A) and (2) of the Act by attempting to cause the Employer to discriminate against employees who are not Respondent's president by granting Respondent's president preferential treatment based on his position with Respondent.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a labor organization within the meaning of Section 2(5) of the Act and it has had a collective-bargaining history with Kidder, Inc., a manufacturer and distributor of printing equipment that annually ships goods and materials valued in excess of $50,000 directly to points outside of Massachusetts. I find that the circumstances meet the Board's jurisdictional standards and that it effectuates the policy of the Act to exercise jurisdiction in a case of this nature.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent has represented a unit of production and maintenance employees at the employer since 1955. A collective-bargaining agreement in effect from November 1, 1995, through October 7, 2000, includes the following provision:

> Article IV-SENIORITY
>
> D. Top seniority, "Super Seniority" for the purpose of layoff only will be granted to five (5) Union personnel who hold the position of President, Vice President, Recording Secretary, Chief Steward and Negotiating Committeeman.

This clause first appeared in the 1983–1986 agreement and was negotiated when there were about 100 employees in the bargaining unit. The superseniority clause has never been amended and has appeared in each successive contract.

John Rico is the Employer's vice president of human resources. He has been employed at Kidder since 1974 and he was part of a group of employees who purchased the business in 1995. In mid-1996 the unit had 82 employees, however, the employer experienced a downturn in sales and, correspondingly, production. It had significant layoffs in early 1998 and currently there are only about 35 employees in the bargaining unit, with another 19 laid off with recall rights.

Inconsistent and declining sales created a continuing shortage of work for some classifications of unit employees. When it appears to management that a slow period will be less than 3 weeks, Rico attempts to move employees from slow areas to other jobs or if certain departments are busier than others, he moves employees from other areas into the busy department. In short-term moves, the employee retains his wage rate regardless whether the job he is temporarily performing is a lower paid classification and also regardless whether he is a union officer entitled to superseniority or simply a unit member. However, if production slowdowns are expected to be 3 weeks or longer, Rico follows the formal layoff procedures contained in the collective-bargaining agreement and any employee who moves to a different pay classification in a formal layoff situation, has his wage rate adjusted accordingly.

Management has production control meetings every Thursday morning and then determine if a layoff is necessary, and if so, how many need to be laid off. Affected employees are given a week's notice of the layoff, usually on a Thursday afternoon. Production needs and an employee's skills, combined with seniority, determine who is going to be laid off. The Union is given a copy of the seniority list with the names highlighted of those to be laid off. The employee is called starting with the most senior. The employee is given the option of taking the layoff, or exercising his seniority to either transfer to an open position on a list he presents to them, or to bump an employee of lesser seniority in an area not affected by the layoff. If an employee subject to layoff bumps into a higher paid position, the employee is paid the higher rate. If he bumps into a lower paid position he receives the lower rate. If, however, the employee formerly worked in that department at a higher rate, he would receive that higher rate. In addition, if an employee performs higher rated work for part of a week, he would receive the higher rate for those hours. The Employer applies these rules whether or not an employee is a union officer subject to superseniority.

In April 1998 management determined that it needed to lay off 8 of the 20 employees in the machining and welding departments. William Pooler, the Employer's only welder, has been employed for 26 years and has been a certified welder since 1987. His wage rate as a welder in April 1998 was $14.51 an hour. Pooler, the local union president, was the only union officer on the layoff list.

Rico met with Pooler, who was accompanied by Union Representative Frank Gramolini. Rico told Pooler his name was highlighted on the layoff list, and gave him the opportunity to exercise his contractual superseniority to bump into a job elsewhere. Pooler said no, he was not going to be moved around; that he had superseniority and that meant he was going to stay where he was. Rico responded that Pooler had to pick a position. Pooler replied he was going to grieve the matter and left the meeting insisting he would not bump anyone. The next day Rico approached Pooler who then agreed to move to the maintenance department where were two unit employees but Pooler insisted he would not displace either of the existing

[1] All the following dates will be in 1998, unless otherwise indicated.

insisted he would not displace either of the existing maintenance employees. Pooler told Rico: "Don't touch my rate; don't touch my classification; and I won't bump anyone." Rico responded that he did not care where Pooler went but there was going to be one less person as a result of Pooler's move. Pooler, under protest, then bumped maintenance employee Jerry Talbot who was laid off as of April 17.

On April 21 Pooler and Chief Steward Frank Gramolini filed the following grievance alleging the employer had violated article iv seniority paragraph d of the collective-bargaining agreement:

> In the past Officials of the union with superseniority were not put on a layoff list, they were moved to other areas of the shop where there was work available that the Official was qualified to do. This was done without any paycuts or bumping of another union member.
> REMEDY SOUGHT
> To pay all monies and benefits lost to William Pooler and Jerry Talbot. To reinstate William Pooler and Jerry Talbot to their previous positions.

Pooler began working in maintenance on April 17 with his wage rate reduced to $14.25 an hour, the classification rate for that maintenance position. He continued to perform necessary but unanticipated welding repair work and performed 36 hours of welding work and only 4 hours of maintenance work that first week and was paid the higher welding rate for those hours he spent welding. (The Employer otherwise has not had the need to employ a full-time welder anytime since April 1998.)

A preliminary meeting over the grievance was held April 21. This was followed by a regular meeting where the Union took the position that Pooler should not have been on the layoff list at all, that he could do other jobs but that the employer could not touch his rate of pay or classification or force him to bump anyone. At this meeting Pooler was concerned by the anticipation that he was going to lose money and Rico again explained that they had to make room for Pooler by bumping someone. On May 6, 1998, Rico submitted a written answer denying the grievance.

In the first week in May management decided to resume performing inhouse sheet metal work that had been jobbing out. Pooler, who had been the last sheet metal employee prior to the contracting out of the work, was recalled to sheet metal on May 4 where he received $15.10 an hour, a rate higher than his welding rate. Talbot then was recalled to maintenance.

By letter dated September 16, the Charging Party-Employer was notified that the Local union was submitting the following grievance to arbitration:

> The Company improperly applied the collective-bargaining agreement with regard to placing the Union President on the layoff list.

By letter of September 18, the Charging Party-Employer received official notice from the American Arbitration Association that the Union was demanding arbitration and on October 2, the employer's attorney returned the list of potential arbitrators as required but advised that the Employer did not believe that arbitration of the claim was lawful.

On October 5, the local union proposed to the Charging Party-Employer that the parties submit the Union's interpretation of the superseniority clause to the Board for a ruling and that if the Board determined the Union's interpretation was lawful, the Company would grant Pooler's grievance, otherwise, the Union would withdraw the grievance. The Employer rejected the Union's proposal noting that it was understood that the Board does not issue advisory opinions and it advised the Union, that unless the Union promptly withdrew the arbitration request, the Employer would be forced to file a charge. After the Union replied that it would not withdraw the arbitration and the Charging Party-Employer filed the instant charge.

In early January 1999, another reduction in force was scheduled and on January 4, 1999, the Union grieved the layoff and bumping of those involved. The grievance was identical to the April 21 grievance and was denied. It is currently being held in abeyance pending the result of the earlier grievance. On February 5, 1999, the American Arbitration Association notified the parties that the arbitration hearing would be held on April 20, 1999. Meanwhile, in February 1999 the Employer's production required little sheet metal work but it had available work in the mechanical assembly area. Pooler, the only employee in sheet metal, was transferred to mechanical assembly without any need for bumping. The move resulted in a reduction in Pooler's rate from $15.10 to $13.65 an hour and generated a grievance that is identical to the two earlier grievances. The Charging Party-Employer denied the grievance and it is being held in abeyance as is the American Arbitration Association proceeding.

Discussion

The Respondent argues the validity of a contractual superseniority clause that protect union officials from being bumped from their jobs citing *Goodyear Tire & Rubber Co.*, 322 NLRB 1007, 1008 (1997), and particularly the Board's language which states:

> Second, and perhaps even more significantly, we believe that once the Respondents have shown sufficient evidence to justify their application of the superseniority clause, the fact that there might be other approaches is irrelevant.

It then argues that the way Local 221 would apply superseniority would not result in "detriment" to any bargaining unit employee, that President Pooler would retain his job and pay rate, and do available work around the shop, he would not bump any other employee and no other employee would be laid off in his place. It also contends that by pursuing its applications of the superseniority it leads to a less discriminatory result by saving the job of a union member.

The General Counsel points out that the policy of the Act in general is to insulate job benefits from union activities. The Board finds superseniority clauses lawful based on the ground that they further the effective administration of bargaining agreements by encouraging the continuity of union representation on the job, thereby serve a legitimate statutory purpose to the benefit of all unit employees. However, superseniority clauses that are not on their face limited to layoff and recall are

presumptively unlawful. See *Dairylea Cooperative,* 219 NLRB 656 (1975). The Board has found that it is an overly broad use of superseniority to allow a steward or retain a particular job, not merely any job, on the relevant shift, see *Mechanics Educational Society Local 56 (Revere Cooper),* 287 NLRB 935, 936 (1987), and superseniority cannot lawfully be used to prevent downgrading (and a possible diminishment of pay) within the same area of representation because this is beyond the minimum extent necessary for the union representative to carry out his or her representational duties. See *Joy Technologies,* 306 NLRB 1 (1992), where a union's demand that a vacant higher paying position be transferred from one plant to another so that the position could be awarded to the union's committeeman in order to accommodate his desire to remain committee person in that plant was improper.

Here, there is no showing that the Employer's placement of the union president's job position on the layoff list, the requirement that the officer either bump another employee or more to a vacant position, or the fact that the Employer pays to the officer the wage rate of the position he bumps into would cause any disruption in continuity of representation. Moreover, this Employer has a small work force where 5 of 35 (or less), unit employees are union officials and it is not a situation where no union official would be available or a large work force is involved and where a union steward might be required to spend his time entirely or substantially on union matters. Otherwise, the Union is attempting to preserve the union president's pay rate or position in a particular job and to prevent the employer from making an ultimate reduction in staffing solely because the primary job position affect by diminishing production requirements is one held by a person with superseniority.

It is clear that these "benefits" (wage protection and job classification protection) would not exist for unit employees who are not union officials and who can be placed on layoff lists from which they exercise bumping rights, and who, following the exercise of their bumping rights, are paid the rate for that position. Accordingly, such additional benefits, available only to union officials, would be discriminatory and, therefore, unlawful.

Here, I find that the Employer's application of its layoff rules is not shown to be inconsistent with its past practices. The Union, by demanding unlawful favoritism and attempting to enforce its demands by arbitration, would force the Employer to discriminate against other employees in violation of Section 8(a)(3) of the Act. Such action by the Union is a violation under Section 8(b)(2) of the Act. See *Auto Workers Local 1161 (Pfaudler Co.),* 271 NLRB 1411 (1984); *Distillery Workers Local 122 (Oz Liquor)*, 261 NLRB 1070 (1982); and *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), all cited by the General Counsel.

The superseniority clause involved here is valid on its face, however, if the union interpretation was incorporated into the language of the collective-bargaining agreement it would not be. Moreover, this language was not the subject of bargaining and no agreement was reached by the parties and an attempt to enforce its unilateral interpretation is improper.

In the instant case the Union has submitted the April 21, 1998 grievance to arbitration. If the arbitration found in the Union's favor, the Employer would be forced to violate Section 8(a)(3) of the Act. Therefore, the Union's effort to have a lawful clause interpreted in a fashion that would violate the Act is unlawful and the Union's attendant submission of the Pooler grievance to arbitration is a violation of Section 8(b)(1)(A) and (2) of the Act, as alleged, see *Plasterers Local 337 (Marina Concrete),* 312 NLRB 1103 (1993).

CONCLUSIONS OF LAW

1. Respondent International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 221, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

2. Kidder, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondent and the Employer have a collective-bargaining agreement and it will effectuate the purposes of the Act to assert jurisdiction here.

4. The Respondent's demand in its grievance filed April 21, 1998, would accord union officials superseniority for terms and conditions of employment not limited to layoff and recall and not otherwise required to further the effective administration of the collective-bargaining agreement, in violation of Section 8(b)(1)(A) of the Act.

5. By demanding that the Employer interpret the parties superseniority clause in the manner presented in its grievance filed April 21, 1998, and by further demanding arbitration of the matter, the Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

REMEDY

Having found that the Respondent Union has engaged in unfair labor practices in violation of the Act, it will be recommended that it be ordered to cease and desist therefore and that it take certain affirmative action to effectuate the policies of the Act.

Inasmuch as it is found that the Union's demanded interpretation superseniority clause in dispute is unlawful, it is ordered that Respondent Union cease and desist from demanding that employee Kidder, Inc., accede to its illegal interpretation by requiring arbitration of its demand and it shall be ordered to withdraw the submission of its grievance in this matter from the American Arbitration Association. Otherwise, it is not considered necessary that a broad Order be issued.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 221, AFL–CIO, its officers, agents, and representatves, shall

1. Cease and desist from

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Attempting to cause Kidder, Inc., to accord superseniority for terms and conditions of employment that are not limited to layoff and recall and are not otherwise required to further the effective administration of the collective-bargaining agreement.

(b) In any like or related manner restraining or coercing the employer in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order notify the American Arbitration Association that it is withdrawing its request for arbitration of the grievance filed with Kidder, Inc. on April 21, 1998.

(b) Within 14 days after service by the Region, return after signing by the Respondent's authorized representative, copies of the attached noticed marked "Appendix,"[3] for posting by the employer at its Agawan, Massachusetts facility, if the employer is willing and maintain for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."